

1767. February 3.

Countess Dowager of CAITHNESS *against* Countess and Earl of FIFE.

No 12.

ALIMENT to a widow from her husband's death till the ensuing Whitsunday, when her liferent annuity fell due, was found to be a burden on the executor, and not on the heir.

Fol. Dic. v. 2. p. 266. Fac. Col.

* * * See this case, No 69. p. 431.

1770. January 26.

RACHAEL BROWN and her SISTERS, Heirs of Line of the deceased Dr Brown of Dundee, *against* ALEXANDER BOWER and Others, Trustees appointed by the deceased Dr Brown.

No 13.

A deed containing dispositive words held to be a disposition and not a testament; but the words "means and effects, heritable and moveable," in that deed, found insufficient to convey a proper heritable subject.

UPON Dr Brown's death in 1768, it appeared that he had made a settlement of his affairs; whereby he 'gave, granted, assigned, and freely disposed,' to Bower and others, as trustees, 'all his goods, gear, means, and effects, heritable and moveable;' and by the same deed he nominated the said trustees his 'sole executors, universal legatees, and intromitters with his means and effects,' with power to give up inventories, and to confirm; declaring that the deed was only to take effect after death. Besides large funds, truly personal, Dr Brown was possessed of several heritable bonds, an adjudication upon which he was infest, and a house in Dundee.

As the deed contained neither procuratory nor precept, the trustees brought an action against Rachael Brown and Sisters, that, as heirs of line, they should make up titles to the heritable subjects, and denude thereof in their favour, in order to their execution of the trust. But to this action it was stated in defence, *1mo*, That the deed which was the title of the action was of a testamentary nature, and therefore ineffectual in law to carry heritable subjects; at least, *2do*, That it could neither carry the adjudication nor house in Dundee. And in support of these it was *pleaded* for the defenders,

1mo, Whatever may have been the intention of a party in making a deed, it was nevertheless a clear proposition laid down by all lawyers, that heritable subjects could be conveyed only in a certain form, and not by a deed of a testamentary nature; Haddington, 21st June 1605, Jack, *voce* TESTAMENT; Stair, 21st February 1663, Wardlaw, *voce* HOMOLOGATION; 13th July 1670, Daughters of Soutrie, *voce* TESTAMENT. Resting, therefore, upon this general rule, the deed in question was not a formal and proper disposition *inter vivos*, but was truly of a testamentary nature. For though it did bear the words 'Give, grant, assign, and dispo,' yet in every other respect it bore the characteristic of a testament; it constituted the trustees 'executors

and legatees,' authorised them to give up inventories and to confirm, and was only to take effect after death. These were the essential ingredients of a testament ; and a decision directly in point was given in the case, 4th December 1735, Brand *contra* Brand, *voce* TESTAMENT, though the defence in that case was, that nothing hindered a testament and assignation *inter vivos* from being on the same paper.

2do, Though the deed should be sustained, so far as to convey such heritable subjects as fell particularly within the words, viz. the heritable bonds; yet there were no words sufficient to carry the other branches of the real estate, the adjudication, and the house in Dundee. The words 'bonds and tenements' were as well known as any other; were always used in a disposition whenever it was meant they should be conveyed; and hence, when not inserted, the omission fell to be held as intentional. The words 'means and effects, heritable and moveable,' never could be construed to extend to a land, estate, or tenement; more especially when these words were adjected to, and followed the words 'goods, gear, &c.' in the dispositive part of the deed. And in the case, 6th Jan. 1736, Mochrie *contra* Linn,* it was found that the words 'goods and gear, debts and sums of money,' did not comprehend an heritable bond.

This doctrine was, at any rate, pointedly applicable to the house in Dundee; and with regard to the adjudication upon which infettment had been taken, as it was a proper heritable subject, the same rule must be followed. An adjudication had been held to be a legal vendition of the debtor's land under a limited right of redemption; the bygone annualrents had been found to belong to the heir even during the currency of the legal; in conveying an adjudication, the common form was to dispoise the lands adjudged with the adjudication as the title; so that it had every quality of an heritable subject.

Pleaded for the Trustees;

1mo, Without controverting the general proposition, that heritage could not be conveyed by testament, it was enough for the pursuers to establish that the present settlement was not a testament, but a general disposition of the whole subjects belonging to the defunct. It was executed in the legal terms and proper style of a disposition; the technical terms 'give, grant, assign, and dispoise,' being expressly made use of. As the deed, therefore, contained a proper dispositive clause, which *per se* was sufficient to convey heritage as well as moveables, it was not vitiated by the after adjection of a nomination of executors, and other clauses of a testamentary nature, agreeable to the maxim *utile per inutile non vitiatur*. The case of Brand *contra* Brand did not apply, as the settlement there was in every respect a proper testament, and so fell under the general rule; and the point at issue had been decided in the case, 11th July 1739, Douglas *contra* Allan;† where, in precisely the same circumstances as the present, the objection, that the deed, being of a testamentary nature, could not affect the heritage, was over-ruled.

* See General List of Names.

† Not Reported, See APPENDIX.

No 13.

2do, As it appeared from the deed itself, that the Doctor was then making a general settlement of his whole funds, no doubt could be entertained but that the adjudication and house in Dundee were meant to be included. His intention appeared also to be sufficiently declared, as the phrase 'heritable means and effects' comprehended lands and houses as well as *nomina debitorum*; and the house in question certainly made a part of the Doctor's heritable means and effects.

Independent of this general argument, it was to be observed, that the adjudication did not fall to be considered as a right of property. The Doctor never had been in possession, the legal was still current; so that it was merely a security for the accumulate sum. The grounds of debt were still subsisting as a part of the creditor's title; and as these, in this case, must fall under the conveyance of 'debts and sums of money,' the adjudication, as inseparable from the debt, must of consequence be carried by the settlement; and the express point had been determined in the case, *Wades contra The Heirs of Marshal Wade*, No 20. p. 221. and No 14. p. 5018.

The Judges were unanimous that the deed was a disposition and not a testament; but upon the general principle, that heritage is never understood to be conveyed unless positively expressed, the majority were of opinion, that the words 'means and effects, heritable and moveable,' were not sufficient to comprehend the house in Dundee. It was therefore found, "That the house in Dundee, disposed by Dr Brown, does not fall under, and is not carried by his deed of settlement to the trustees, and with regard thereto assoilzies; and as to the other heritable subjects, decerns against the defenders in terms of the libel."

Lord Ordinary, *Justice Clerk*.

For Rachael Brown and Sisters, *D. Rae*.

For Bower, &c. *Macqueen, Crosbie, Nairn*.

R. H.

Fac. Col. No 15. p. 32.

1773. November 16.

GEORGE, LORD KINNAIRD, *against* MAGDALEN, Lady-Dowager of KINNAIRD.

It having been adjudged by a final decree of the Court, in November 1770,* in an action at the instance of Joseph Austin, and others, "in respect of the acquiescence in, and homologation of the division of the common, and decrees-arbitral in question, by the predecessors of Lord Kinnaird, that the pursuers are entitled to payment from the representatives of Charles Lord Kinnaird, of the sums libelled as his share of the expense of the said division;"—the next point was, how far these claims affect both the heir and executor of the said Charles, Lord Kinnaird, or only the executor?

THE LORD ORDINARY 'found Lady Kinnaird, the executrix, liable in this expense, as being a moveable debt.'

And the COURT adhered on a reclaiming petition and answers.

Act. Ja. Fergusson.

Alt. Rae.

Clerk, Campbell.

Fol. Dic. v. 3. p. 266. Fac. Col. No 90. p. 227.

* Not Reported.

No 14.

A claim for a defunct heritor's share of the expense attending the division of a common, in which he had an interest, found to be a debt that affected the executor.